No. 13946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY WYNN,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, TREASURE COMPANY, SAMARKAND OIL COMPANY, EMPIRE OIL COMPANY, TRUST OIL COMPANY, and SOUTHERN CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

OPENING BRIEF OF APPELLANT HARRY WYNN.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

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Jurisdiction.

The plaintiff, Harry Wynn, filed this complaint on September 16, 1952, in the Superior Court of the State of California. Summons was issued by the state court on September 16, 1952. [R. pp. 6-8.]

The complaint [R. pp. 8-21] seeks to set aside a contract [R. pp. 149-182] transferring to the Reconstruction Finance Corporation all the assets of Treasure Company and G. de Bretteville, as being in *fraud of creditors; and alleges* that Reconstruction Finance Corporation had full knowledge of the moneys due plaintiff from his royalty interests and also of plaintiff's ownership in the lease-

holds involved, and of the requirements of the California Corporation Commissioner that any such contract must be first submitted to said commissioner for approval; that the contract was not submitted to the California Corporation Commissioner for his approval and *consequent* protection of the royalty holders, and that the contract was made by defendants for the purpose of delaying, hindering and defrauding the creditors of Treasure Company and G. de Bretteville.

The complaint alleges that the contract was re-dated to May 31, 1949, so as to bring its inception *after* the jury trial in the condemnation action. [See contract date, R. p. 150.]

The complaint alleges that said contract provided that the first $150,000.00 should be paid to *any one* of de Bretteville's *four corporations,* as he might designate. [R. p. 174, line 3, *et seq.,* of contract.]

* * *

All of the defendants, who are residents or corporations of California, except Reconstruction Finance Corporation (its charter permits it to be sued in any state court) filed a Petition for Removal from the state court to the Federal Court on October 6, 1952 [R. pp. 2-5], and the cause was automatically so removed.

All of the defendants filed Answers to the Complaint on October 10, 1952, in the Federal District Court. [R. pp. 22, 27, 31.]

A Motion to Remand the cause to the state court was filed by plaintiff on December 24, 1952. [R. pp. 68-72.]

A Motion for Summary Judgment was filed by all defendants on December 4, 1952.

The Federal Court entered its order granting motion for partial summary judgment and filed same June 8, 1953 [R. pp. 119-120], and Findings of Fact and Conclusions of Law were signed by Judge Hall on June 8, 1953. [R. pp. 113-118.]

An order denying the Motion to Remand was signed by the said judge and filed on June 8, 1953. [R. p. 112.]

Notice of Appeal from the summary judgment and the order denying plaintiff's motion to remand the cause to the state court was filed by plaintiff on July 6, 1953. [R. p. 121.]

The jurisdiction of this Court to *review* the judgment of the District Court is conferred by the provisions of 28 United States Code, Section 1291.

Statutes Involved.

"Corporation organized under federal law as party. The district courts shall *not* have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock. June 25, 1948, c. 646, 62 Stat. 934."

United States Code, Title 28, Sec. 1349.

"Actions removable generally.

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have *original* jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and divi-

sion embracing the place where such action is pending.

"(b) Any civil action of which the district courts have *original* jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable *only* if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937."

United States Code, Title 28, Sec. 1441.

"Civil Rights Cases.

"Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendants to the district court of the United States for the district division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for re-

fusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938."

United States Code, Title 28, Sec. 1443.

Questions Presented by This Appeal.

1. That the Federal District Courts have no jurisdiction of this action.

2. That by reason of such lack of jurisdiction the District Court erred in denying Wynn's motion to remand the case to the state court from whence it came.

3. That the District Court erred in granting a summary judgment, basing its decision upon a condemnation judgment in another case, which latter judgment did not even pretend to rule upon the allegations of this complaint,—to the effect that a certain contract of assignment was executed in fraud of creditors.

Under the above premises Finding IX [R. p. 115]* is immaterial and Conclusions of Law III [R. p. 117] holding that the issue of the effect of this assignment is *res judicata* is incorrect and the summary judgment based thereon is improper and without justification.

4. That the District Court erred in even considering the condemnation judgment because at the time of the jury trial in the condemnation case the contract under attack in the case at bar was *not in existence.*

Under the above premises Finding VII [R. p. 115] is useless and without legal effect since it refers to find-

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*The references preceded by "R." are to the typewritten record on appeal herein.

ings allotting and distributing the jury award in the condemnation action.

5. The District Court erred in relying upon the condemnation judgment since the question of fraud was not even raised in any of the proceedings in the condemnation action—especially the fraud charged in the complaint in the instant case.

6. The District Court erred in Finding XII [R. p. 116] reading (in part) as follows:

> "The said agreement did not transfer, or contemplate the transfer, of any rights in real property to Reconstruction Finance Corporation by Trust Oil Company, nor by Treasure Company, nor by G. de Bretteville."

The contract under attack refutes said Finding XII because it contains the following clause:

> "In order to settle and compromise this dispute and to settle the three companies' claim for compensation for the taking of their *real and personal* property, the parties hereto, with the approval and consent of the three companies, have entered into this agreement." [R. p. 153.]

7. The District Court erred in not granting plaintiff's request to submit the affidavit of the California Corporation Commissioner to the effect that the contract of assignment under attack was not submitted to him for approval as required by his permit, and said court also erred in not granting plaintiff's request to submit the affidavit of the Attorney General that he had never approved this contract as required by its terms.

This request was made under Rule 56(f) of the Rules of Civil Procedure. [R. pp. 102-104.]

8. The petition for removal to the Federal Court fails to state facts showing that defendants were denied or could not enforce in the state courts any rights secured to them by any law providing for the equal civil rights of United States citizens, as required by Section 1443 of Title 28 of the United States Code. [Petition for Removal, R. pp. 2-5.]

9. The federal courts lack jurisdiction of this action for the following reasons:

1. There is no diversity of citizenship.
2. The action involves a transfer of the assets of a debtor without consideration and in fraud of creditors.
3. The assets are leasehold interests situated in Los Angeles County.
4. The federal courts do not have original jurisdiction of this fraud action and the action does not arise under the Constitution, treaties or laws of the United States as required by the removal statute. (U. S. Code, Title 28, Sec. 1441.)
5. Section 1349 of Title 28 is worded in the negative and confers no jurisdiction upon federal courts.
6. The complaint contains no allegation of the jurisdictional amount required in the federal courts.

10. The Reconstruction Finance Corporation entered into this fraudulent contract *independently* of any condemnation action—took over assets belonging to a debtor—failed to submit this contract for approval to and by the California Corporation Commissioner, as required by the permit of which Reconstruction Finance Corporation was fully informed, and Reconstruction

Finance Corporation rendered itself amenable to the courts of the State of California by knowingly joining with said debtor to defraud the creditors.

11. A condemnation judgment, if any defense, can be submitted in a state court as well as in a federal court and its existence confers no jurisdiction upon the federal courts.

Statement of the Case.

The plaintiff, Harry Wynn, established his ownership of 6 per cent royalty interests in certain leaseholds situated in Los Angeles County and described same in his complaint.

The complaint alleges that one of the leaseholds produced oil and gas which was sold for the sum of $205,411.69 and that the Treasure Company and G. de Bretteville did not pay Mr. Wynn his 6 per cent of that amount (subject only to deductions of necessary maintenance and operation charges), except the small sum of $88.54 on one occasion.

On September 28, 1942, the United States of America and the Reconstruction Finance Corporation filed a condemnation action condemning this leasehold and others.

On December 8, 1943, Harry Wynn filed an answer in said condemnation suit and *thereby* in said answer served notice *on Reconstruction Finance Corporation* of the moneys due him from the leasehold by reason of its production. [R. p. 73, line 20, to p. 74, line 4.]

That at the jury trial in the condemnation action there was introduced into evidence a document [R. p. 84, lines 3-10] showing that the California Corporation Com-

missioner required Treasure Company not to make any assignment of this leasehold without getting the approval of said Commissioner by filing the contract of assignment with him, and that the Reconstruction Finance Corporation was thereby and during the jury trial placed on notice of this requirement.

That approximately two weeks *after* the jury's verdict the Reconstruction Finance Corporation, *with full knowledge* of the indebtedness due Harry Wynn from Treasure Company and G. de Bretteville, entered into and executed a certain assignment of this leasehold and thereby received all of the assets of Treasure Company, to the detriment of plaintiff and other creditors having royalty interests in this leasehold.

This contract permitted Treasure Company and its other corporations, which are simply "fronts" for G. de Bretteville, to drill wells and to operate the leaseholds, as ostensible agent for the Reconstruction Finance Corporation, but upon the usual basis of any ordinary oil lease under which the lessee acquires 87½ per cent of production by reason of his operation of the premises. The full import of the contract is pleaded in the complaint. [R. pp. 8-22; see R. pp. 149-182 for contract.]

Plaintiff now seeks to set aside this contract as being in fraud of creditors and to quiet title to his royalty interests in the premises.

The summary judgment is in effect a ruling that the Reconstruction Finance Corporation *evades* the charge of fraud by reason of the condemnation judgment.

The condemnation judgment was rendered *prior* to the time that the Reconstruction Finance Corporation entered

into this alleged fraudulent contract and hence has no effect on the question of fraud here involved.

Under this contract Treasure Company and G. de Bretteville could easily evade any attachment levied by any creditor under the following provision of said contract:

> "and that said $150,000.00 be paid to said three companies (Treasure Company—de Bretteville, President; Samarkand Oil Co.—de Bretteville, President; Empire Oil Company—de Bretteville, President) or their assigns in such proportions as TOC (Trust Oil Company—de Bretteville, President) shall direct immediately upon the filing of said stipulation and the making of the order of the court to make said payment." [R. p. 174, line 3.]

Specification of Errors.

I.

The District Court erred in accepting jurisdiction in this case and in refusing to remand the case to the state court from whence it came.

II.

The District Court erred in ruling that a judgment in a condemnation proceeding constituted a defense to this action, seeking to set aside a contract by which there was a transfer of property in fraud of creditors, especially since said contract came into existence *after* the condemnation judgment.

III.

The District Court erred in not permitting the plaintiff to produce the affidavit of the California Corporation Commissioner to the effect that this fraudulent contract

assigning all the assets of Treasure Company to Reconstruction Finance Corporation had not been first submitted to said official as required by the permit granted Treasure Company.

IV.

The District Court erred in not permitting the plaintiff to produce the affidavit of the United States Attorney General to the effect that he had never approved this contract now under attack.

ARGUMENT

The first cause of action of the complaint is directed to the setting aside of a written contract entered into in the State of California and pertaining to real estate situated in said state. The mere fact that the Reconstruction Finance Corporation was signatory to this contract does *not change* the nature of the contract and does not make the contract a federal contract.

Nor does the fact that the Reconstruction Finance Corporation signed the contract insert into the contract any federal statute or Act of Congress.

The basis of the first cause of action, as set forth in paragraph XX [R. p. 18], is to reach property belonging to Treasure Company and G. de Bretteville.

The basis of the second cause of action is also to reach property belonging to Treasure Company and G. de Bretteville and, as stated in paragraph II [R. p. 19] of the second cause of action, that said contract and *assignment* therein of all the assets of Treasure Company and G. de Bretteville were intended and were made by the defendants for the purpose of delaying, hindering and

defrauding the creditors of Treasure Company and G. de Bretteville by putting it out of the power of such creditors to reach the property and assets of the said Treasure Company and G. de Bretteville.

Such issue does not involve a federal statute nor an Act of Congress.

The third cause of action [R. pp. 19-20] is in the nature of a quiet title action against certain premises situated in the State of California, by reason of the fact that said contract was fraudulent and therefore could not transfer any of plaintiff's interests or any of the interests of Treasure Company and G. de Bretteville.

It is apparent that if the Reconstruction Finance Corporation has title to any property by reason of a valid judgment, that judgment may be pleaded as a defense in the courts of the State of California.

The Federal District Court Lacks Jurisdiction of This Action.

The case at bar involves equitable principles enforceable only in the state courts.

> "* * * The charge against the defendant was not that it had violated the patent laws, but to set aside the license on the ground that it had been *fraudulently and inequitably obtained.* * * *
>
> "It is also pointed out in Wilson v. Sanford, 10 How. (U. S.) 99 (13 L. Ed. 344), that an injunction cannot issue unless the contract is set aside, the Court saying, 'The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, "that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned

by the court," and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside.' (3) *since Owens' case was of general equitable jurisdiction it did not arise under the patent laws but under the equity branch of the state law* and *jurisdiction over it vested in the state court.* (Luckett v. Delpark, 270 U. S. 496 (46 S. Ct. 397, 70 L. Ed. 703, 705); New Marshall Engine Co. v. Marshall Engine Co., 223 U. S. 473, 480 (32 S. Ct. 283, 56 L. Ed. 513, 516).)" (Emphasis added.)

Heinz v. Superior Court, 115 A. C. A. 418-423.

The Case at Bar Is of General Equitable Jurisdiction, Did Not Arise Under Any Federal Law or Statute, but Did Arise Under the State Laws and the Jurisdiction Over It Vested in the State Court.

"It is a general rule that a suit by a patentee for royalties under a license or assignment granted by him, or for any remedy in respect of a contract permitting use of the patent is *not* a suit under the patent laws of the United States, *and cannot be maintained in a Federal court as such.* Wilson v. Sanford, 10 How. 99, 13 L. ed. 344; Brown v. Shannon, 20 How. 55, 15 L. ed. 826; Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; Albright v. Teas, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550; Dale Tile Mfg. (503) Co. v. Hyatt, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; Marsh v. Nichols, S. & Co., 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; Briggs v. United Shoe Machinery Co., 239 U. S. 48, 60 L. ed. 138.

"In Wilson v. Sanford, *supra,* a bill in equity was filed in a Federal circuit court setting forth complainant's ownership of a patent, an assignment to

defendants of a license in consideration of five promissory notes, with a condition of reversion to complainant on failure to pay any note. The bill averred that the first two notes were not paid, insisted that the license was forfeited by the failure and the licensor was fully reinvested at law and in equity with all his original rights, that the defendants were using the patented machine and were infringing the patent, prayed an account of profits since forfeiture, a temporary and permanent injunction, and a reinvestiture of title in the complainant. On demurrer, *the bill was dismissed for lack of jurisdiction* as not arising under the patent laws. Chief Justice Taney, speaking for the court, said:

"The rights of the parties depend *altogether upon common law and equity principles.* The object of the bill is to have the *contract set aside and declared to be forfeited;* and the prayer is 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is in consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, *depended altogether upon rules and principles of equity,* and in no degree whatever upon any act of Congress concerning patent rights." (Emphasis added.)

Luckett v. Delpark, 270 U. S. 496.

In the Case at Bar the Rights of the Parties Depend Altogether Upon Common Law and Principles of Equity.

> "The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. *For courts of a state may try questions of title, and may construe and enforce contracts relating to patents.* Wade v. Lawder, 165 U. S. 627, 41 L. ed. 852, 17 Sup. Ct. Rep. 425. *The present litigation belongs to this case.*" (Emphasis added.)
>
> *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473 (32 S. Ct. 238, 56 L. Ed. 513-516).

Appellant submits that *in the case at bar the state court must try questions of fraud, validity of a contract* and *title to property.*

That Negative Section of the United States Code Does Not Confer Jurisdiction Upon the District Court.

Title 28, United States Code Annotated, Section 1349, reads as follows:

> "The district courts shall *not* have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress unless the United States is the owner of more than one-half of its capital stock."

It will be noted that the above section is worded in the *negative.* It states that the district courts shall not

have jurisdiction upon the ground of incorporation by an Act of Congress unless more than one-half of its capital stock is owned by the United States.

Note well that the section does not say that it has any jurisdiction of anything, either exclusive jurisdiction or original jurisdiction, *even if its capital stock is owned by the United States.*

In other words, we must look to other sections of the United States Code to ascertain the subject-matter which confers jurisdiction.

There Is No Diversity of Citizenship.

The Reconstruction Finance Corporation concedes that diversity of citizenship is not involved in the case at bar.

Complaint Alleging Fraud Confers No Federal Jurisdiction.

In *Rhodes v. National Iron Bank of Pottstown,* 35 Fed. Supp. 650, the complaint alleging fraud *was dismissed* by federal court for want of jurisdiction, as fraud was not a federal question.

Jurisdictional Amount.

The complaint contains no allegation of the jurisdictional amount required for an action in federal courts.

Other Sections of United States Code Do Not Confer Jurisdiction Upon a Federal Court in the Case at Bar.

The United States District Courts do not have *original* jurisdiction of the present civil action.

The claim or right of plaintiff does not arise under the Constitution, treaties or laws of the United States.

Hence the case is not removable under Section 1441 of Title 28 of United States Code—(Actions removable generally).

Section 1443 of Title 28 of United States Code—(Civil Rights cases) does not permit removal of the case at bar because the *petition* for removal *fails to state facts* showing that defendants are denied or cannot enforce in the state courts any rights secured by them of any law providing for the equal civil rights of citizens of the United States.

If defendants rely upon a judgment of the federal court —same may be introduced into the state courts with like effect.

Since the act creating the Reconstruction Finance Corporation permits it "to sue and be sued in a state court," the ground for removal because of diversity of citizenship does not apply.

Had the complaint been filed originally in the Federal Court, any one of the defendants could have removed it by proper motion to the state court on the grounds that the issues involved were only such issues as are covered *by state law*—both common law and equity.

The Affidavits of the California Corporation Commissioner and the United States Attorney General Would Show an Evasion of the California Law by Reconstruction Finance Corporation and Also Show the Questionable Aspects of This Contract of Assignment.

Plaintiff requested to produce these affidavits [R. pp. 102-104—request] but his request was not granted.

The Reconstruction Finance Corporation was placed on notice of the requirements of the California Corporation Commissioner at the time of the jury trial in *its* condemnation action because the written requirement was introduced into evidence.

The California Corporation Commissioner would have enforced this clause and protected the plaintiff.

> "* * * Treasure Company agrees not to sell, encumber, assign, convey or otherwise dispose of its leasehold estate or any interest therein without first making adequate *provision* for the protection of the royalty holders and *submitting* a copy of the assignment, conveyance and/or instrument utilized for such purpose to the Commissioner of Corporations of the State of California." [R. p. 84, lines 3-10.]

This secret contract was *not* submitted to the California Corporation Commissioner and the Attorney General did *not* approve same.

Certainly the Reconstruction Finance Corporation has knowingly committed a fraud upon the royalty holders in these leaseholds.

Conclusion.

An action to set aside a transfer, whether fraudulent or not, of a debtor's assets and subject same to the payment of his debts and to quiet the title of the creditor in such property wrongfully transferred (with full knowledge on transferee's part of the claims of the creditor) is an action arising "under the equity branch of the state law and jurisdiction over it vested in the state court."

The instant action does not arise under the Constitution, treaties or laws of the United States.

The mere fact that Reconstruction Finance Corporation was named as a defendant, together with five California corporations and one resident of California, does not confer any jurisdiction on a federal court.

There is doubt as to the jurisdiction of the federal court, hence such doubt "is sufficient ground for remanding a removed case to the state court from which it had been removed." (*Georgia v. Southern R. C.,* 255 Fed. 369.)

We submit that the summary judgment should be reversed and that the Order denying the motion to remand the case to the state court should be set aside and the case ordered remanded to the state court from whence it came.

Respectfully submitted,

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